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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
NO. 96-111

IB Docket No. 96-111

Amendment of the Commission's
Rules to Allow Non-U.S.-Licensed
Space Stations to Provide
Domestic and International
Satellite Service in the United
States

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Orbital Communications Corporation ("ORBCOMM"), a wholly owned subsidiary of Orbital Sciences Corporation ("OSC"), hereby comments on the Notice of Proposed Rulemaking addressing the standards under which the Commission will allow the use of satellites licensed by foreign Administrations to provide service in the United States.¹ ORBCOMM believes that the *Notice* correctly identifies the issues that must be addressed in connection with requests to operate foreign-licensed satellites in the United States to ensure that any such entry will not adversely affect satellite services competition, and hence the interests of satellite services consumers. ORBCOMM urges the Commission to adopt rules and procedures that will be effective in minimizing the risk of competitive distortion in this critical segment of the U.S. economy.

As a leader in the development of commercial low-Earth

¹ Amendment of the Commission's Rules to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, FCC 96-210, released May 14, 1996 (hereafter cited as "Notice").

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orbit ("LEO") mobile satellite services, ORBCOMM is very interested in this proceeding. ORBCOMM was formed by its parent company to enter the mobile satellite services business. Founded in 1982, OSC is one of the country's leading commercial space technology companies. It designs, manufactures, operates and markets a broad range of space products and services, including launch systems, satellites, space sensors and electronics, suborbital tracking and data systems, and satellite-based communications and remote sensing systems.

ORBCOMM was granted its license to construct, launch and operate a Non-Voice, Non-Geostationary ("NVNG") satellite system in October 1994.² The first two ORBCOMM satellites were successfully placed into orbit on April 3, 1995 on a Pegasus® launch from Vandenburg A.F.B. and are currently providing commercial services.

By their nature, LEO mobile satellite systems such as ORBCOMM's are inherently global, insofar as the constellation of satellites will overfly all of the Earth's surface. ORBCOMM therefore will be competing with other global systems on a worldwide basis. Of particular concern to ORBCOMM is the competition with the intergovernmental organizations ("IGOs") and their progeny,³ because of the potential ability of those

² Orbital Communications Corporation (Order and Authorization), 9 FCC Rcd 6476 (1994); recon. denied, 10 FCC Rcd 7801 (1995).

³ ORBCOMM considers the IGOs (Intelsat and Inmarsat) and their progeny to be largely interchangeable, insofar as the spinoffs of the IGOs apparently will reflect their treaty-based heritage and will likely continue to have at least some government ownership. Notice at ¶ 64. Thus, any reference in this pleading to an IGO should also be read to include the affiliates or spinoffs of an IGO.

entities to compete unfairly.

In light of the global nature of LEO systems, ORBCOMM views as critical the goal announced in the Notice of seeking to open foreign markets to U.S.-licensed satellite systems.⁴ ORBCOMM also shares the Notice's concern that entry into the U.S. satellite services market by foreign-licensed systems not adversely impact competition, which could be the case if that foreign-licensed system had access to markets that were closed to U.S.-licensed satellite systems.⁵ ORBCOMM thus supports the Commission's proposal to restrict entry as a means of achieving these goals. Under the framework proposed in the Notice, foreign-licensed satellite systems would be granted access to the U.S. market only if the relevant foreign markets are equally open to U.S.-licensed satellite systems. By way of example, ORBCOMM is presently experiencing great difficulty in obtaining access to France, and thus that country should not be deemed "open."⁶

The Notice suggests several potential procedural frameworks for analyzing whether to permit entry into the U.S. market. Under the basic test, the Commission will determine the "home country" of the foreign-licensed satellite system, and then decide whether that "home country" has any *de jure* or *de facto* restrictions on U.S. satellite systems' provision of domestic or international services in that country. In addition, the Notice suggests that the Commission would undertake a route-by-route

⁴ Notice at ¶ 1.

⁵ Notice at ¶ 11.

⁶ Indeed, ORBCOMM is not even being permitted to bring into France a "test set" that would allow it to demonstrate how its satellite system avoids interference to other terrestrial services operating in the same bands.

analysis of the openness of the markets, to be sure that the foreign-licensed satellite system does not have access to any countries that is denied to U.S.-licensed satellite systems.

The Commission recognizes that this proposed basic procedural framework would not be workable for the IGOs (Intelsat and Inmarsat), because the "home countries" (that is, the Administrations that coordinate on behalf of the IGOs) do not reflect the multinational characteristic of these entities.⁷ In addition, since those IGOs serve nearly every country, a route-by-route analysis would be exceedingly cumbersome and require the expenditure of inordinate resources.⁸

The Notice also discusses a "critical mass" approach.⁹ Under this analysis, the Commission would allow entry into the U.S. satellite services market if a sufficient number of the member countries of the IGOs had opened their markets to U.S.-licensed satellite systems.¹⁰ However, as the Commission recognizes, such an approach "raises difficult questions about exactly which countries are relevant and how 'critical mass' can be defined to an acceptable level of regulatory certainty."¹¹

In recognition of the shortcomings of the "home market/route-by-route" and "critical mass" frameworks, the Commission suggests an additional alternative framework to apply

⁷ Notice at ¶'s 64-65. As the Notice observes, some 136 national governments are members of Intelsat, and some 78 are members of Inmarsat.

⁸ Notice at ¶ 64.

⁹ Notice at ¶ 31.

¹⁰ Notice at ¶'s 66-67.

¹¹ Notice at ¶ 31.

in the case of entry by IGOs. The Notice suggests an approach whereby the Commission would attempt to determine "whether the IGO, in light of its intergovernmental status and global dominance, would be in a position to diminish effective competition in the United States."¹²

ORBCOMM believes that in the case of IGOs and their progeny, the Commission should use a combination of both the "critical mass" and the "review of the ability to diminish competition" approaches to determine whether entry into the U.S. satellite services market would be appropriate. Clearly, without at least the opportunity to provide service in the vast majority of countries comprising the IGO members, the IGO satellite systems would have an unfair competitive advantage, since they could offer service in all those markets, while the U.S.-licensed systems could only offer partial coverage.

Particularly for NVNG satellite systems like ORBCOMM's, the authority to provide service anywhere is essential. Thus, a "critical mass" analysis should be used as an initial "hurdle" to determine whether the IGO or its progeny should be permitted access to the U.S. satellite services market. A failure to meet this test should result in excluding that entity from the U.S. market. In addition, ORBCOMM urges the Commission to adopt such an initial test because it may provide incentives that could lead to the opening of foreign markets to U.S.-licensed satellite systems.

ORBCOMM additionally believes that the Commission should further apply an entry test based on the extent to which

¹² Notice at ¶ 68.

entry by the IGO or its progeny could adversely impact competition in the satellite services markets both here and abroad. The IGOs retain extraordinary capabilities to compete unfairly, many of which the Commission acknowledges. As multinational governmental treaty organizations, the IGOs are endowed with special privileges and immunities.¹³ The IGOs receive favorable tax treatment and in many instances are exempt from national regulation. The IGOs currently enjoy dominant market positions in the international satellite services markets, and typically the IGO member entities are the primary (if not only) suppliers of satellite services within their countries. Moreover, as the *Notice* recognizes, the progeny of the IGOs are likely to retain many of those advantages, because they will enjoy a treaty-based heritage and will continue to have significant government ownership.¹⁴

ORBCOMM is also concerned because there are additional means, not addressed in the *Notice*, by which the IGOs or their progeny could unfairly compete. For example, as a result of their control over certain exclusive markets and the vast resources of the government owners, the IGOs and their progeny could engage in predatory pricing and cross-subsidization. In addition, the government members are able, through indirect means such as the standards-setting process or discriminatory application of facially neutral rules, to exclude (or make much more difficult) entry by U.S.-licensed satellite systems. Moreover, the government members will typically also be

¹³ *Notice* at ¶ 62.

¹⁴ *Notice* at ¶ 64.

responsible for coordination activities. In the case of mobile satellite systems (such as ORBCOMM's NVNG system), coordination and access to spectrum on a global basis is particularly important. In sum, the IGOs and their progeny retain a number of subtle (and not so subtle) means of unfairly affecting competition.¹⁵

ORBCOMM thus believes it would be appropriate for the Commission to consider fully all of these potential competitive impacts in deciding whether to permit entry or expansion in the U.S. satellite services market by the IGO and their progeny and under what terms and conditions such entry should be permitted. Only if the Commission determines that entry will not adversely affect competition should it permit the IGOs or their progeny to offer services in the United States.

While ORBCOMM believes that such an analysis preceding entry is necessary, ORBCOMM does not believe that such an entry test on its own is sufficient to prevent anticompetitive actions. ORBCOMM also believes it is important for the Commission to apply ongoing conditions on any such entry to minimize the IGOs continuing threats to competition. The IGOs' ability to impact competition adversely is a threat that extends well beyond the point when the Commission decides whether or not to permit entry.

ORBCOMM thus urges the Commission to develop appropriate structural and/or nonstructural safeguards to minimize the risk of competitive injury. Structural separation, cost allocation requirements, information access limitations, disclosure obligations and other similar continuing safeguards

¹⁵ See n. 6, supra.

must accompany any entry by the IGOs and their progeny into the U.S. satellite service market. The Commission cannot merely apply a static model that views the potential adverse impact on competition only at the single point in time when entry is sought. The Commission must implement adequate safeguards that will continue to apply to the IGOs and their progeny as they operate in this market.

In sum, ORBCOMM believes that the Commission, in crafting a regulatory framework for evaluating entry requests by non-U.S.-licensed satellite systems, must take into account the special abilities of the IGOs and their progeny to impact competition adversely. Such a framework should include both a "critical mass" test and an additional analysis of whether such entry would have an adverse impact on competition. Finally, if after applying these tests the Commission decides to permit entry by the IGOs or their progeny, it must carefully condition any such entry to include appropriate safeguards to ensure the existence of a continuing "level playing field."

Respectfully submitted,

By



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